THE STATE
versus
ALLAN MUNYARADZI MUPAMBO

HIGH COURT OF ZIMBABWE
OMERJEE & UCHENA JJ
HARARE, 7 October 2004 and 10 November 2004

**Criminal Appeal**

Mr *Toto*, for the appellant
Mrs *Chiumburu*, for the Respondent

UCHENA J: The appellant was charged with armed robbery and the contravention of Section 4(1)(b)(i) of the Firearms Act [*Chapter 10:09*]. He pleaded guilty to both counts and was convicted by a regional magistrate sitting at Rusape Magistrate's Court.

He was on the robbery charge sentenced to 9 years imprisonment of which 2 years was suspended on conditions of good behaviour and 6 months was suspended on condition the accused paid restitution to the complainant. On the second charge he was sentenced to $600 000.00 idp 2 years imprisonment. In addition 2 years imprisonment wholly suspended for 5 years on condition he does not during that period acquire or possess any firearm or ammunition without a permit.

The appeal is against sentence only. At the hearing we dismissed the appeal and indicated the reasons would follow. These they are:-

According to his own statement to the police produced by the defence, the appellant left his parents' house in Mutare and traveled to Juliasdale with his girlfriend. They drove to his parents' plot in Juliasdale, and slept there. In the morning he left his girlfriend and drove to Juliasdale. The motor vehicle broke down 3 km from the plot. He then took the gun he had removed from his father's gun cabinet in Mutare and concealed it by covering it with a jacket. He with determination walked for 15 km towards

Mutasa DC on his way to Juliasdale shopping centre. From Mutasa District Council he got a lift to Juliasdale in a Police Recovery Vehicle. He went to BP Service Station Kiosk and bought himself a drink and some food. He then waited at the Kiosk which is 5 km from Zimbank for about one hour. When he realized there were no people in the vicinity he entered the bank (ZIMBANK) with his gun and had covered his face with a mask. In the bank he ordered the security guard to hand over his gun to him. The security guard complied. He then ordered the security guard to close the door to the bank. The security guard complied. He then ordered the bank staff to put all the money they had into a bag he had brought for that purpose and the rest into a box. As the bank employees complied with this order he fired a shot from his gun into the air. He then demanded that the bank manager surrender his car keys to him. The bank manager complied. He then ordered the guard and staff to put the bag and the box into which money had been packed into the boot of the manager's car. He ordered them to return into the bank and surrender the bank's keys to him. They complied and he locked them in and drove away in the manager's car with the proceeds of the robbery.

He drove to his parents plot picked his girlfriend and drove to Africa University where he left his girlfriend with the money. He drove to Mutare where he left his gun and the bank security guard's gun. He then drove to Marondera where he abandoned the bank manager's car to divert police investigations.

He concluded his statement by apologizing to the complainant and his staff.

The appellant is aged 20. The money, gun and motor vehicle were recovered. The $10
000.00 which was not recovered was paid back by the complainant as restitution.

The appellant's counsel admits that the trial magistrate considered all the mitigatory factors in this case but says he paid lip service to them. He

referred us to the case of *S v Buka* 1995(2) ZLR 130 at 134G where EBRAHIM JA said:-

> "I have no difficulty with the analysis of the learned judge in his consideration of the aggravating and mitigating features in this case. He clearly took great care in determining what is an appropriate sentence on the facts of this case.
>
> It is my view, however, that judicial officers do not always give sufficient weight where an accused person tenders a plea of guilty to a charge leveled against him. It is important not merely to pay lip service by repeating what one is expected to say when a plea of guilty has been tendered. (my emphasis).

In the present case the narration of the appellant's exploits in the commission of the offences takes this case out of this general criticism. The appellant armed himself with his father's gun in Mutare. He traveled to his father's plot. He left his girlfriend there so he could commit the robbery at Juliasdale. He was not dissuaded by the breakdown of his motor vehicle just 3 km from his parents' plot. He concealed the gun in his jacket and walked 15 km on foot towards Juliasdale where he was to rob a bank. He had the courage to get a lift in a police recovery vehicle in his determination to get to Juliasdale. He fed himself and patiently waited for an hour for the opportune time to rob the bank. He masked himself to avoid identification. He then robbed the bank with the courage and determination not expected of a young man of his age. He fired a shot to remind his victims that he was on a serious mission. He terrified them with fear to the extend of surrendering the money, the manager's car, the security guards gun, their service and the keys to the bank. He locked them in and drove away uninterrupted.

He gave the money to his girlfriend for safe-keeping. He abandoned the car in Marondera to divert investigations.

He clearly carefully planned the offences. He committed the offences with sufficient criminal resolve that nothing could stop him. He was prepared to walk 15 km to achieve his criminal resolve to rob the bank. He was patient enough to wait for an hour to execute the robbery without

interruption. He was careful in the commission of the offence. He calculated his movements and timing with accuracy. He masked his face and wielded his gun with skill and totally subdued the bank's employees.

It must be said that bank robbery is a very serious offence which should attract a sufficiently deterrent sentence regard being had to the circumstances of the offence and the offender.

The regional magistrate in my view correctly considered the seriousness of the offence, the premeditation, the appellant's contrition, age and his being a first offender. On page iv of the record he said:-

> "For a more mature adult I would not have hesitated to impose 10 years for this robbery. For this contrite, youthful first offender I think 9 years imprisonment adequately fits the gravity of the offence and level of potential prejudice. As credit for the guilty plea, previous clean record, co-operation with the police and recovery of most of the property, I will suspend 2 years imprisonment."

In my view this was a careful analysis of the aggravating and mitigating features. I cannot find any justification for appellant's counsel's submission that the magistrate paid lip service to the mitigating factors.

It must be pointed out that while youthfulness and being a first offender is mitigatory regard should not be lost of the gravity of the offence. If a youthful first offender commits a very serious offence he will be sentenced to an appropriate sentence after considering his being a youthful first offender. The magistrate clearly said he would have imposed 10 years for an adult. He imposed 9 years because of the appellant's youthfulness. He further credited him for being a first offender, the recovery of complainant's property and money, his contrition and co-operation by suspending two years. The appellant entered crime from the deep end and was sentenced accordingly.

A judicial officer who presides at the trial has a discretion in sentencing the offender. That discretion should not be lightly interfered with by a court of appeal.

In the case of *S v Nhumwa* S-40-88 KORSAH J.A. said:-

> "It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severer than one that the court would have imposed sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court."

In the case of *S v De Jager & Anor*. 1965 (2) SA 616(A) at 628-9 HOLMES JA said:-

> "It is the trial court which had the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised that is to say, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regards an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognized that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary is very limited." (emphasis added)

In the present case the sentence imposed by the regional magistrate was clearly within his discretion and compares well with sentences approved by the Supreme Court and this court in similar cases.

In the case of *Davison Mberi and 2 others v State* SC 52/82 FIELDSEND CJ at page 3 of the Cyclostyled judgment said:-

> "I should say at once that this does not seem to be an appropriate case for suspending any of a sentence of imprisonment despite the fact that the appellants are first offenders. There is ample authority for the proposition that the mere fact of a person being a first offender is not necessarily a proper ground for suspending a period of imprisonment. HARVEY V R 1951 S.R. 93 One must look at the nature of the offence and the nature of the offender. The appellants, particularly the first and the second were not very young people - the one was 30 and the other 20 and I think the third appellant was about 19. The offence itself was a very serious one. …… It is unfortunately a prevalent offence at the moment and it is essential that the courts should be seen to be imposing severe sentences in order to try and put a stop to the unlawful behaviour and the armed robberies that are continuing." (emphasis added)

In conclusion at page 4 he said:-

> "In my view the sentences on the appellants respectively should be 12 years imprisonment, 10 years imprisonment and 8 years imprisonment. On count two ……3 years imprisonment in each case."

The appellants in *Mberi Supra* were charged with attempted murder and possession of arms of war. Though the charge in count 1 is not robbery it was an attempted murder in the course of a robbery. The Chief Justice's main consideration in imposing the sentences was the seriousness of robbery, its prevalence and the need to deter robberies. The age of the second and third appellants is the same as appellants in this case. The appellants in *Mberi* supra fired at the complainant several times. Their attempt to rob was in my view not as well organized as the appellant's robbery.

The case of *Mberi Supra* is clear authority that being youthful and a first offender will be appropriately matched with the seriousness of the offence committed and that courts will not hesitate to impose severe sentences if the offence is a serious one. I must say robbing a bank in broad day light using a firearm, putting the lives of the bank's employees at risk is a very serious offence.

In the case of *Maxwell Thola Sithole v The State* H-B-73-82 the appellant was convicted of armed robbery and possession of an offensive weapon in contravention of section 37(1) of the Law & Order (Maintenance) Act [*Chapter 65*]. The appellant robbed a bus conductor of $30.00. For the armed robbery he was sentenced by the regional magistratre to 9 years imprisonment. For possession of an A.K. rifle and three fully loaded magazines, he was sentenced to 4 years of which 3 years were ordered to run concurrently with the sentence imposed in the first count.

The appellant in Sithole Supra was aged 22. He was slightly older than the appellant in this case.

At page 4 of Sithole's cyslostyled judgment LLOYD AJ had this to say:-

> "The appellant's youthfulness cannot be of assistance to him in seeking a deduction of the quantum of his sentence for it is young men

> who are often involved in cases of armed robbery and possession of offensive weapons and materials."

Though I am of the respectful view that youthfulness should still be considered as mitigatory the fact that the youth have a propensity of committing robberies should guide courts against over emphasizing youthfulness in arriving at an appropriate sentence as that may encourage the youth to commit robberies.

In Sithole's case the appellants appeal against the sentences imposed by the regional magistrate was dismissed.

In the case of *S v Ramushu & Others* SC 25-93 a gang of rich youth acting with a slightly older person robbed a Jewellery Shop and fled in a gate away car with jewelery worth $160 000.00. They used an unloaded A.K. rifle but the complainant was terrified and submitted to the taking of the jewellery. In that case the court held that jewellers were vulnerable and needed special protection. Sentences of 12 years imprisonment of which 5 years was suspended on good behaviour and 2 years on restitution were confirmed even though the appellants were aged 18 and 19 years. The court noted that the offence was well planned.

In the present case the appellant is aged 20 and he committed the offence after careful planning and with absolute resolve and determination.

The sentence imposed on him does not therefore induce a sense of shock. It is within the range of sentences for similar offences by similar offenders.

It is high time that youthful offenders and others like minded be warned that courts will not hesitate to imprison offenders who resort to robbery as a way of earning a living. As was said in *Ramushu Supra*, institutions like jewelery shops and banks should be protected against persons who believe they can earn an easy living by robbing them.

In the case of *Christopher Makonese and Ngoni Mudhirinza* HC-H-247-86 EBRAHIM J as he then was at page 3 of the Cyclostyled judgment commenting on sentences imposed on two robbers aged 26 said:-

> "This is an extremely serious case in which a dangerous weapon was used to terrify the victims and which weapon was actually fired." (emphasis added)

At page 2 he said:-

> "The magistrate in sentencing the appellants took these factors into account but rightly weighed them against the fact that they were both guilty of extremely serious offences. He correctly was of the view that the offences committed were of the type which if they were to become prevalent, could only have an extremely harmful effect on the fabric of law and order in this country." (emphasis added)

I respectfully associate myself with the learned Judge's views. In that case the appellants were charged with 1 count of attempted robbery, 1 count of robbery of $110.00 and 1 count of c/s 37(1) of the Law and Order (Maintenance) Act [*Chapter 65*] that is possession of weapon of war. They pleaded guilty and were first offenders. The first appellant who had obtained the firearm from his place of employment was sentenced to 10 years imprisonment for counts 1 and 2 both counts having been taken as one for sentence and for count 3 he was sentenced to 5 years which was ordered to run concurrently with the sentence for counts 1 and 2. The effective sentence was 10 years imprisonment. The second appellant who had played a lesser roll was sentenced for counts 1 and 2 to 8 years imprisonment both counts having been treated as one for sentence. For count 3 he was sentenced to 3 years which was ordered to run concurrently with the 8 years for counts 1 and 2. His effective sentence was 8 years.

When the facts of this case are compared to those of *Makonese's case supra* it would seem the appellant got a sentence on the lower side for the robbery charge as I view his offence as being more serious than that in *Makonese's case*. He obviously was sufficiently credited for his youthfulness and his being remorseful.

As for the appellant's sentence on the possession of the firearms, the law has been amended and a fine is now an appropriate sentence. The magistrate imposed a fine of $600 000.00 which is $400 000.00 below the

maximum. In addition 2 years imprisonment wholly suspended on condition of good behaviour. He considered that the appellant possessed the firearm because he wanted to rob. He considered the cumulative effect of the sentences on the robbery and the Firearm Act charges. He clearly did not misdirect himself. The 2 years wholly suspended was meant to deter the appellant.

I am therefore of the view that the sentences imposed by the trial magistrate do not induce a sense of shock. The magistrate did not misdirect himself. There is therefore no room for interference in respect of the sentences imposed by the magistrate.

In the circumstances the appeal is dismissed in respect of both counts.

OMERJEE J, agrees:…………………………..